



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: CNA Industrial Engineering, Inc.--Costs

File: B-271034.2

Date: November 20, 1997

Richard L. Hames, Esq., Davis Wright Tremaine, for the protester.
Steven W. Feldman, Esq., Department of the Army, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel,
GAO, participated in the preparation of the decision.

DIGEST

1. Costs of filing and pursuing a protest are not limited to costs associated with the sustained issue alone where it was not necessary to resolve the other issues raised by the protester in view of the fact that the General Accounting Office (GAO) recommended that the agency reopen discussions.
2. GAO recommends that successful protester be reimbursed costs related to the time spent in pursuit of the protest by its own employee and its subcontractors' employees to the extent that such costs are reasonable; the protester and the subcontractors acted in concert in filing and pursuing the protest, and the protester is obligated to reimburse its subcontractors for employees' time.
3. Hours charged by an employee of the successful protester's subcontractor as part of its claim for pursuing its protest are unreasonable where they exceed the time spent by the protester's attorney, they are not adequately supported, and they are duplicative of hours claimed by the protester's employee.

DECISION

CNA Industrial Engineering, Inc. requests that our Office recommend the amount that it should be reimbursed by the United States Army Corps of Engineers for the costs of filing and pursuing its protest under request for proposals (RFP) No. DACA87-95-R-0092. The RFP was for installation and testing of an automated storage and retrieval system for use at the Brooke Army Medical Center, San Antonio, Texas, and for associated maintenance and training services. We sustained CNA's protest against the award to GeneSys, Inc. because GeneSys had no interface

experience with the Army's information software system, the so-called TAMMIS system, as required by the RFP, and, therefore, the award to GeneSys amounted to an improper relaxation of the RFP's minimum requirements.¹

CNA initially submitted its claim for costs, totaling \$72,682 directly to the Corps of Engineers. After an exchange of correspondence between the parties regarding, among other things, allowability of certain costs, severability of costs for issues that were sustained from those that were not, reasonableness of the hours claimed, and sufficiency of the evidence to support the claim, CNA revised its claim downward to a total of \$62,732.² The Corps rejected the bulk of the claim and offered CNA partial reimbursement totaling \$12,081. CNA rejected the agency's offer and submitted the claim to our Office.

The Corps contends that CNA's entire claim should be rejected because the original protest was untimely. According to the Corps, CNA should have known that GeneSys did not have the required TAMMIS experience and therefore should have filed its initial protest on that basis within 14 days after CNA was notified on December 28, 1995, that the contract had been awarded to GeneSys.³ The Corps asserts that CNA knew at that time that the TAMMIS system was deployed at just one site, the Madigan Army Medical Center, and that CNA, not GeneSys, had a contract with the Army at that site which would give it the required TAMMIS interface experience. As CNA waited until after it was debriefed by the Corps on February 1, 1996, to file its original protest in our Office, the Corps asserts that the original protest (filed on February 5) was untimely.

The Corps's contention provides no reason to reject CNA's claim for the costs of pursuing its successful protest. The facts that the Corps now believes establish the untimeliness of CNA's protest—that CNA, by virtue of its one Army contract, must have known that it was the only firm with TAMMIS experience and that the

¹For a full discussion of the facts and our rationale in sustaining CNA's protest, see CNA Indus. Eng'g. Inc., B-271034, June 7, 1996, 96-1 CPD ¶ 279.

²The reduction represented costs associated with a size status protest brought by CNA before the Small Business Administration (SBA) in connection with the award to GeneSys and improperly included in the initial claim for protest-related costs.

³Under the Bid Protest Regulations in effect at that time, 4 C.F.R. § 21.2(a)(2) (1996), a protester had to file its protest within 14 days after it knew or should have known its protest basis.

awardee could not have the required experience--was known or should have been known to the Army at the time CNA filed its protest. We will not now, in the context of considering a claim for costs, consider arguments that could and should have been raised in the original protest. See Tony Western-Recon., B-241169.3, May 21, 1991, 91-1 CPD ¶ 489 at 3.

In addition to the TAMMIS interface experience issue, CNA protested that the Corps's evaluation of CNA's proposal was unreasonable because the Corps had downgraded its proposal regarding the proposed source site license, software maintenance, and temporary shelving. The Corps contends that CNA's reimbursement should be limited to the costs incurred in pursuing the TAMMIS interface experience issue that we sustained, but not the other issues. The Corps asserts that the other issues are severable because they were not sustained and because they concerned the evaluation of CNA's proposal, not whether GeneSys met the experience requirement. The Corps estimates that only about one-third of the total protest costs were related to the TAMMIS experience issue and, therefore, asserts that CNA's reimbursement should be limited to just one-third of the total allowable costs.

As a general rule, we consider a successful protester entitled to costs incurred with respect to all issues pursued, not merely those upon which it prevails. Omni Analysis; Department of the Navy-Recon., 68 Comp. Gen. 559, 562 (1989), 89-2 CPD ¶ 73 at 3-4, except for costs allocable to a losing protest issue that is so clearly severable as to essentially constitute a separate protest. Price Waterhouse--Claim for Costs, B-254492.3, July 20, 1995, 95-2 CPD ¶ 38 at 3.

All of the issues raised by CNA were intertwined parts of CNA's objection to the agency's evaluation of proposals and its decision to award the contract to GeneSys. All issues raised and arguments made by CNA were directed at the reasonableness of the agency's evaluation and whether that evaluation was consistent with the RFP's stated scheme. In this regard, the RFP required the Corps to evaluate experience as part of the management evaluation and specifically stated that TAMMIS interface experience was required. Accordingly, CNA argued not only that the evaluation of its own proposal was unreasonable, but that the evaluation of GeneSys's proposal was unreasonable as well, and, in pursuing the protest, CNA's attorney was required to examine the record of both its own and the awardee's evaluation. When we sustained the protest on the TAMMIS requirement issue, we recommended that the Corps reopen discussions and allow offerors to submit revised proposals in response to the relaxed experience requirement. While we did not need to resolve the other issues concerning the Corps's downgrading CNA's proposal, we noted that the Corps had never discussed those alleged deficiencies with CNA and suggested that the Corps do so during the reopened discussions.

Therefore, the other issues raised by CNA are not so distinct from the TAMMIS experience issue as to constitute different protests, and we recommend that CNA be reimbursed the costs of pursuing all protest issues. Fritz Cos., Inc.--Claim for Costs, 73 Comp. Gen. 250, 252 n.1 (1994), 94-2 CPD ¶ 58 at 3 n.1.

We next examine the components of CNA's claim for the costs of filing and pursuing the protest. The legal expenses billed to CNA by its attorney, totaling \$28,029, were comprised of \$1,155 for miscellaneous expenses (charges for such items as photocopying, telecopying, on-line legal research services, and Federal Express delivery services) and \$26,874 in legal fees.⁴ The remainder of the claim, totaling \$34,703, represents the time expended by CNA's and its subcontractors' employees, and by a consultant (a former employee of CNA), allegedly incurred in pursuit of the protest.⁵

We recommend CNA be reimbursed \$1,069 for miscellaneous expenses. From the total amount claimed (\$1,155), we have deducted \$62.50 for Westlaw Dun & Bradstreet usage charges on January 4, 1996; presumably, a Dun & Bradstreet report would have been useful to CNA in connection with the size status protest it was pursuing before the SBA at that time, but obtaining such a report would not appear to have been part of pursuit of a protest filed with our Office. We have also deducted \$23.50 for unknown expenditures made in June for which no invoice or other documentation has been submitted. All other charges for miscellaneous expenses are allowed because CNA's attorney has certified that his firm incurred the expenses and has provided invoices showing that these expenditures were related to the protest and were, in fact, charged to CNA, and because we have no basis to question the reasonableness of the claimed amounts.

⁴The legal fees represented 105.7 hours spent by the attorney and two paralegal assistants; the billing rate for the attorney's hours was \$260 per hour and the billing rate for the paralegal assistants was either \$45 or \$50 per hour. Of the hours claimed, we find, as discussed below, that 102.4 hours were spent in pursuit of the protest.

⁵The claim represents a total of hours 274.5 hours allegedly spent by CNA's employees and its subcontractors' employees and a consultant at hourly rates ranging from \$15 to \$67.50 per hour. CNA and its subcontractors have added between 150 and 200 percent overhead to the hourly rates. While the Corps contends that the overhead is excessive, CNA has provided documentation supporting the overhead rates, and we have no basis for finding them unreasonable.

We recommend that CNA be reimbursed \$26,079 for legal fees.⁶ From the total amount claimed (\$26,874), we have deducted \$795 as follows:

1. The attorney billed CNA for 2 hours of his time on January 22 to review the RFP and "prepare letter regarding requirements for debriefing." We disallow this portion of the claim because preparation for the debriefing conference, which was held on February 1, was not time expended in pursuit of the protest. We therefore deduct \$520 (2 hours at the attorney's rate of \$260 per hour).
2. The attorney billed CNA for 4 hours of his time on January 31 for work on a variety of matters, including reviewing the SBA decision on CNA's size protest; the time spent on each matter is not delineated. We disallow 1 hour of this claim because time spent reviewing the SBA decision cannot reasonably be construed as time spent in pursuit of the protest. We therefore deduct \$260 (1 hour at the attorney's rate of \$260 per hour).
3. The attorney billed CNA for 0.3 hours on February 2 for time spent by a paralegal assistant doing research on the SBA matter. This was not time spent in pursuit of the protest. We therefore deduct \$15 (0.3 hours at the paralegal's rate of \$50 per hour).

Regarding the \$34,703 claim for 274.5 hours allegedly spent by CNA's own employees, its subcontractors' employees, and the consultant, the Corps argues generally that the hours claimed are excessive and that they are not adequately documented.

⁶The Corps argues that \$260-per-hour attorney's fee is excessive. Since the protester's attorney's office is located in Richland, Washington, the Corps argues that the attorney's fees should be limited to the prevailing rate of law firms in that area. The Corps states that it contacted a lawyer from a town adjacent to Richland, discussed CNA's protest issues with that lawyer, and ascertained that the prevailing rate should be no more than \$165 per hour. CNA's attorney points out that his law firm, Davis Wright Tremaine, has a national practice, with offices in a number of cities throughout the United States, and he contends that his fee is typical of other national law practices specializing in government contracts; he has sworn that he charged CNA his customary rate of \$260 per hour, which is the rate established by the executive committee of his firm. We do not think that the \$260-per-hour rate is unreasonable, since it is well within the normal range charged by large law firms practicing before our Office. Moreover, because CNA is a small business, it is not subject to the general statutory limit of \$150 per hour for attorneys' fees. 31 U.S.C. § 3554(c)(2) (1994).

A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim. JAFIT Enters., Inc.--Claim for Costs, B-266326.2, B-266327.2, Mar. 31, 1997, 97-1 CPD ¶ 125 at 2. The amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable; a claim is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in pursuit of the protest. Id.

In view of our recommendation that CNA be reimbursed for only about 102 hours of its attorney's time spent in filing and pursuing the protest, we agree with the Corps that CNA's claim for 274.5 additional hours spent by its own employees and those of its subcontractors and a consultant is excessive. We note that the protected protest documents were releasable only to individuals admitted to the protective order issued by our Office, and thus the in-house employees (who were not admitted to the protective order) had no access to significant portions of the record. Moreover, CNA has provided very little documentation to support this portion of its claim. In fact, the sole supporting document consists of a matrix showing only the employees' names, terse and very general descriptions of the type of work that each employee was doing over time periods of a week or two, and the total number of hours that the employees allegedly worked during those time periods. The matrix contains no detailed descriptions showing how the work related to the protest, and the matrix aggregates the hours worked on several different tasks for each employee within each time period. Also, there are no timesheets or statements from any of the employees showing the amount of time or what they were doing in pursuit of the protest.

Nonetheless, reviewing the protester's documentation in light of its attorney's invoices and the record compiled during development of the protest, we recommend that CNA be reimbursed \$9,654.50 for time expended by its own employees, its subcontractors' employees, and the consultant in pursuing the protest.⁷ Specifically, from the total amount claimed (\$34,703), we recommend deducting a total of \$25,048.50 as follows:

1. CNA claimed a total of 118 hours for work that was done in preparation for and during the debriefing conference. We recommend disallowing these

⁷The Corps argues that the time expended by the subcontractors employees is not reimbursable. However, the record shows that the subcontractors were acting in concert with CNA in pursuing the protest, and CNA has stated that it is obligated to reimburse the subcontractors if it receives reimbursement from the government. A protester may properly be reimbursed for such costs if otherwise payable. TMC, Inc.--Claim for Costs, 69 Comp. Gen. 199, 201 (1990), 90-1 CPD ¶ 111 at 3.

hours because they were not reasonably incurred in pursuit of the protest. See Princeton Gamma-Tech, Inc.--Claim for Costs, 68 Comp. Gen. 400, 403-404 (1989), 89-1 CPD ¶ 401 at 5. In fact, CNA's initial protest letter, which was filed shortly after the debriefing conference was held, specifically stated that CNA learned its protest bases during the debriefing conference. Thus, the debriefing conference was a reasonable starting point for work on the protest. We therefore recommend disallowing \$14,057.70 representing these 118 hours.

2. CNA claimed a total of 156.5 hours for work that was done subsequent to the filing of the protest. With the exception of time claimed by one subcontractor employee, these hours appear to be reasonable. However, that one employee claimed that he spent 106 hours on protest-related work (such as responding to the attorney's requests for information, reviewing briefs submitted by the agency and the intervenor, reviewing the agency's report, and reviewing CNA's attorney's work products). While these tasks relate to the protest, we consider the amount of time claimed to be excessive, especially in view of the fact that the hours claimed exceed those allowed for the attorney and because an employee of the protester was doing this same work and had claimed 38 hours for doing so. Furthermore, as much of the record was covered by a protective order, most of this work should have been accomplished by the attorney. Since we believe that a prudent person would have relied on the protester's attorney to do this work, and because this work duplicates work claimed by the protester's employee, we recommend that only a fraction of this time be allowed. See Fritz Cos., Inc.--Claim for Costs, *supra*, at 7. After reexamining the various dismissal requests, briefs, and other documents in the original protest record, we consider 20 hours to be a more reasonable estimate of the time necessary to do the work claimed. See JAFIT Enters., Inc.--Claim for Costs, *supra*, at 3-4. We, therefore, recommend disallowing \$10,990.80, representing 86 hours claimed by this employee.

We also recommend that CNA be reimbursed an additional \$1,170 representing the attorney's fees (4.5 hours at a rate of \$260 per hour) for pursuing this claim for protest costs before our Office. 4 C.F.R. § 21.8(f)(2) (1997).

Accordingly, we recommend that CNA be reimbursed \$37,972.50 as the reasonable costs of filing and pursuing the protest and the cost of pursuing this claim. This sum includes:

1. \$1,069 for its miscellaneous expenses;
2. \$26,079 for legal fees;

3. \$9,654.50 for time spent by employees and a consultant; and
4. \$1,170 for the cost of pursuing this claim for protest costs.

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